

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of Jeffrey S. Brooks
Serial No. 09/855,890
Filed May 15, 2001
For Footwear

Art Unit 3728

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TECHNOLOGY CENTER 3700

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DECLARATION OF JEFFREY S. BROOKS

I, Jeffrey S. Brooks, declare and state as follows:

1. I am a podiatrist and the named inventor in the above-identified patent application, as well as in U.S. Patent Nos. 5,787,610 and 5,964,046 from which the above-identified application claims priority.

2. I am a consultant to Payless ShoeSource, Inc. In my capacity as consultant, I design footwear for Payless and assist Payless with advertising and marketing of footwear. As a result of these consulting duties, I am thoroughly familiar with the footwear made and sold by Payless and with the advertising and marketing efforts of Payless.

3. I granted Payless a license to import, make, use, offer for sale and sell footwear recited in the claims of the aforementioned patents. In return for granting Payless these rights, Payless pays me a royalty based on sales volume of footwear falling within the claims of the patents and regularly reports sales volume to me. Accordingly, I have knowledge of the sales volume of footwear falling within the claims of the above-identified patent application, and U.S. Patent Nos. 5,787,610 and 5,964,046.

4. In 1998, Payless sold more than five million pairs of footwear falling within the claims of the above-identified patent application and patents. In 1999, Payless sold more than fifteen million pairs of footwear falling within the claims of the above-identified patent application and patents. In 2000, Payless sold more than 35 million pairs of footwear falling within the claims of the above-identified patent application and patents. These high annual sales occurred without significant increases in advertising. The large increases in sales from year to year were due at least in part to Payless switching all of its children's footwear to footwear falling within the claims of the above-

identified patent application and patents. Payless made this switch after recognizing its customers would benefit from the claimed footwear and would be more likely to buy footwear having the attributes recited in the above-identified patent application and patents.

5. Most of the footwear sold by Payless to date falling within the claims of the above-identified patent application and patents is footwear sold under the SMARTFIT trademark. All footwear sold under the SMARTFIT trademark falls within the claims of the above-identified patent application and patents.

6. Payless bought print advertising in several widely distributed periodicals describing the benefits of the SMARTFIT footwear. An example of this print advertising is shown in Exhibit * A (attached). The print ads describe the benefits of the SMARTFIT footwear. These advertised benefits have undoubtedly contributed to the previously described commercial success of the footwear. The benefits advertised in the print ads include the "patented shoe support system" which offers "arch support" and "extra cushioning".

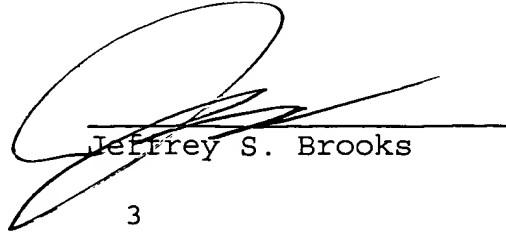
7. The advertised "arch support" and "extra cushioning" provided by the SMARTFIT footwear results from the specific structure recited in the claims of the above-identified patent application. For example, claim 1 recites footwear comprising a sole having a heel section and an arch section. The claim recites that at least a portion of a lateral region of the heel section provides a first compressible resilience for attenuating the shock of impact to the wearer during running and walking and at least a portion of a medial region of the arch section provides a second compressive resilience harder than the first compressive resilience for providing firm support for the foot. The claim further recites that the sole has a forefoot section having a first region for supporting the first, second, third, fourth and fifth metatarsal heads, associated phalanges and metatarsal phalangeal joints, and the metatarsal neck associated with the fifth metatarsal head having the aforementioned first compressive resilience for attenuating the shock of impact. The portions of the sole of the footwear having the first compressible resilience provide the

advertised areas of extra cushioning. The portion of the arch section having the second compressive resilience for providing firm support provides the advertised arch support. Thus, the advantages of the recited footwear are generally described in the print advertising.

* 8. The advantages of the recited footwear are described with more particularity in Exhibit B (attached), which is an in-store ad used by Payless sales associates when educating customers regarding the SMARTFIT footwear. The in-store ad includes an actual insole used in SMARTFIT footwear. This insole has the properties recited in the claims of the above-identified patent application. Further, the in-store ad includes a diagram labeled "Key Impact Points on Foot" which shows blue circular areas where the foot impacts the shoe. The diagram also shows the portions of the sole having the first compressible resilience and the portions having the second compressible resilience. The blue areas are located in the portions of the sole having the first compressible resilience. Above the diagram, the in-store advertising states, "The patented Smart Fit insole design fits the shape of the foot and provides support and cushioning for improved comfort and wearability . . ." Thus, the advertising identifies the benefits of the footwear recited in the claims of the above-identified patent application. These advertised benefits provided by the recited footwear structure have undoubtedly contributed to the previously described commercial success of the footwear.

9. I further declare that all statements made herein of my knowledge are true and that all statements made on information and belief are believed to be true; and further, that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

8/15/01
Date



Jeffrey S. Brooks